444

(3)

No. 09-444

Supreme Court, U.S.
FILED
NOV 5 - 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

LORETTA K. KELLY,
WARDEN, SUSSEX I STATE PRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS E. KELLY, JR.
Counsel of Record
STANFORD E. PURSER
JOANNE M. HEPBURN
K&L GATES LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
(206) 370-6683
thomas.kelly@klgates.com

ROBERT LEE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
2421 Ivy Rd., Suite 301
Charlottesville, VA 22903
(434) 817-2970
roblee@vcrrc.org

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson St.
Tallahassee, FL 32301
(850) 224-0004
meolive@aol.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

(Execution scheduled for November 17, 2009)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY TO NEW POINTS MADE IN THE STATEMENT OF THE CASE IN THE BIO 1

A. The Courts Below Have Not Made Factual Findings For Purposes Of Post-Conviction Review 1

B. The Petition Has Not Misstated The Record 2

1. Ms. Gragg's Testimony As To Why She Changed Her Story 2

2. Suppressed Exculpatory Evidence Regarding What The Thrall Boy Saw 3

3. The Redacted Cell Phone Tower Location Information 5

4. The Trial Judge's Statement That The Jury Could Conclude That Elliott Was Not In The Townhouse And That The Murders Were Perpetrated By Other(s) .. 6

a. The Trial Judge's Statement That The Evidence Supports A Finding That Someone Other Than Elliott Was In The Townhouse And Committed The Crimes 6

b. The Testimony Of The DNA Expert ... 7

TABLE OF CONTENTS – Continued

Page

5. Conflicting Testimony Regarding When The Blood Drop On The Outside Back Gate Was Found By Officer Leo..... 8

CONCLUSION 8

SUPPLEMENTAL APPENDIX

Excerpts of Testimony of Rebecca Gragg.....A-1

Excerpts of Police Interview of Larry Bill Elliott.....A-3

Excerpts of Police Interview of Rebecca Gragg.....A-4

L.P. Kowalski June 12, 2002 letter, with attachments.....A-6

Trial Judge's Statement A-10

Certificate of Analysis A-13

Excerpts of Testimony of Bryan Edmonds.....A-14

TABLE OF AUTHORITIES

Page

CASES

Elliott v. Commonwealth, 593 S.E.2d 270 (Va. 2004) 2

Elliott v. Warden, 652 S.E.2d 465 (Va. 2007) 2

RULES

Rules of the Supreme Court of the United States 15.2 and 15.6 (2007) 1

Federal Rule of Civil Procedure 12(b)(6) 8

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Larry Bill Elliott ("Elliott") respectfully replies to the new points raised in the Respondent's Brief in Opposition ("BIO").

REPLY TO NEW POINTS MADE IN THE STATEMENT OF THE CASE IN THE BIO

The Respondent attempts to avoid the central question presented by the Petition – whether Elliott raised issues that are "debatable" and worthy of a Certificate of Appealability – by diverting the Court's attention to a consideration of the facts in the light most favorable to Respondent (BIO 2-9), and accusing Elliott of several misstatements of the record. (BIO 9-13).

Elliott feels duty-bound to reply to these accusations. Rules of the Supreme Court of the United States 15.2 and 15.6 (2007).

A. The Courts Below Have Not Made Factual Findings For Purposes Of Post-Conviction Review

Despite Respondent's assertion to the contrary (BIO 2-9), the Supreme Court of Virginia made no findings of fact on direct appeal. Rather, "in accordance with well-established principles of appellate review,"

the court simply "recounted" the evidence "in the light most favorable to the Commonwealth." *Elliott v. Commonwealth*, 593 S.E.2d 270, 273 (Va. 2004).

Neither did the state supreme court make such findings of fact when granting Respondent's motion to dismiss Elliott's petition for writ of habeas corpus without an evidentiary hearing. *Elliott v. Warden*, 652 S.E.2d 465 (Va. 2007).

Finally, the federal district court failed to make such findings of fact and only referred to the narrative of the Supreme Court of Virginia on direct appeal. (Pet. App. A-3).

Thus, Respondent's "Facts of Elliott's Crimes" are not the equivalent of findings of fact for purposes of post-conviction review.

B. The Petition Has Not Misstated The Record

Respondent accuses Elliott of making five "misstatements or misleading descriptions of facts" in the Petition. (BIO 9). This is not true.

1. Ms. Gragg's Testimony As To Why She Changed Her Story.

The Respondent writes that Elliott incorrectly stated that Gragg "told jurors that *the only reason* she dramatically changed her story to implicate Elliott after four months of denying any knowledge of the crimes was because police told her that Elliott had

been taken into custody and she no longer feared he would harm her if she told the truth." (BIO 9). (emphasis in original)

Ms. Gragg's testimony was correctly summarized by Elliott and Respondent provided no citation to the record to the contrary. In the Petition, Elliott cited to Habeas Record (hereinafter "HR") 1586-87. (Pet. 4). Since Respondent has now called into question the accuracy of this citation, Elliott has filed a copy of the pertinent questions and answers from those pages as Pet. Supp. App. A-1-2.

Ms. Gragg's "I was afraid until he was arrested" story has the ring of truth unless she is confronted with the other major event that occurred that day, *i.e.*, she was told she had failed a polygraph test and would be prosecuted. Hence, there was a real need to be able to ask her to admit that it was the police telling her she had failed the polygraph – rather than them telling her that Elliott had been arrested – that caused her to talk.

2. Suppressed Exculpatory Evidence Regarding What The Thrall Boy Saw.

It is the Respondent, not Elliott, who misstates the evidence.

The Respondent complains that "Elliott asserts that the [sic] Thrall's six-year-old son said that he saw 'a black man running out of' the townhouse 'right after the murders'" (BIO 10). The Respondent implies that Elliott ignores the fact that this information is

hearsay. But the Petition carefully, and accurately, states: "Cameron Thrall, uncle and adoptive parent of Thrall's two boys, later told Elliott's habeas investigator that the older boy said that he saw 'a black man running out of' the townhouse 'right after the murders.'" (Pet. 10). This is precisely what the investigator's affidavit, an excerpt of which is reprinted by Respondent herself, at Resp. App. 4, states.

The Respondent also complains about Elliott's statement as to what Officer Kovach told Elliott's investigator. (BIO 11). But the excerpts from the investigator's affidavit show that the Petition is completely accurate in its description of what the officer had said. *Compare* Pet. 10-11 with Resp. App. 3-4.

The Respondent then observes that "Tina Miller, the neighbor who called 911, saw the boys with a detective but did not know what, if anything, the boys said." (BIO 11). But the Petition never claimed that she had heard the contents of the interview. The salient points of Ms. Miller's affidavit are: (a) it corroborates what Officer Kovach told the investigator; and (b) it demonstrates that the hearsay affidavits of Detective Hoffman and the two prosecutors – none of whom were in Ms. Miller's house when the boys were interviewed – stating they "have no knowledge" of any statements made by the boys are not probative of anything. It is also telling that the Respondent failed to contradict Ms. Miller's affidavit by obtaining an affidavit from the other detective whom Ms. Miller said did interview the boys: "Later in the day a detective came to my house and interviewed the boys." (Resp. App. 5).

3. The Redacted Cell Phone Tower Location Information.

Police interrogators told both Elliott and Gragg that they were in the process of obtaining cell tower information in order to determine the location of cell phone calls. *See, e.g.*, HR 5714-15 (Detective Hoffman to Elliott: "We're going to track your cell phone calls, every cell phone call you made. You know we're gonna do that if we haven't done it already, okay? . . . we're going to do it and put you in certain places . . . ") (Pet. Supp. App. 3); HR 2197-98 (Detectives to Gragg: "we could tell you exactly from where a cell phone call was made . . . that's going to happen. That's in the works") (Pet. Supp. App. 4-5).

The records sent by the police to Elliott's trial counsel were redacted (the data on the "cell site" column were blacked out) and revealed no cell tower locations. (Pet. Supp. App. 6-9). Respondent's speculation at this late date that the cell phone company would print a report with the cell tower data and then just black it out by hand before sending it is absurd on its face: one would expect the company to print a report without that data. The only reasonable conclusion is that the police did the redacting. Notably, even though Elliott made the redaction a claim in his state habeas petition, none of Respondent's affiants disclaimed Elliott's allegation that the Commonwealth redacted the records.

Respondent's accusation does not point out a misstatement of the record. Instead, it highlights the

need for an evidentiary hearing on a disputed matter before the lower courts summarily dismissed Elliott's claims.

4. The Trial Judge's Statement That The Jury Could Conclude That Elliott Was Not In The Townhouse And That The Murders Were Perpetrated By Other(s).

a. The Trial Judge's Statement That The Evidence Supports A Finding That Someone Other Than Elliott Was In The Townhouse And Committed The Crimes.

Based on the expert testimony he heard, the judge observed that the testimony was "that at least one or perhaps two blood stains from the crime scene were found, the blood sample which was composed of the blood of one of the victims and a third party, not the Defendant." HR 1855 (Pet. Supp. App. 10). He then concluded:

> I think that the Jury could infer from the evidence that someone else was there inside and that is because of the blood evidence, testimony that was put into evidence. So, the Jury could infer that. They could infer that your client was in or about the scene and that *someone else was inside*.

HR 1857-58 (Pet. Supp. App. 11-12). (emphasis added).

b. The Testimony Of The DNA Expert.

The Respondent fails to accurately describe the expert testimony. The Certificate of Analysis prepared by the Commonwealth's DNA/blood expert, Mr. Edmonds, concluded that Item 3, blood found inside the house, was a mixture of the blood of Ms. Thrall, the female victim, and the DNA of another person. HR 1824. (Pet. Supp. App. 13). In his testimony, the expert eliminated Elliott's DNA as a contributor to that mixture; could not eliminate Mr. Finch, the male victim; but testified that "[the DNA mixed in with Ms. Thrall's blood] could be actually from another individual." HR 1824-25. (Pet. Supp. App. 17-18).

Moreover, the expert concluded that the DNA detected on Finch's jeans was "[a] mixture DNA profile consistent with Robert A. Finch and at least one other individual." HR 2595-96. (Pet. Supp. App. 14-15). The expert's report eliminated Elliott as a contributor but could not make any conclusion as to whether Ms. Thrall was the other contributor. *Id*. The expert testified that, in regard to the DNA on the jeans, "I can't tell you who with [sic] that particular foreign DNA is from." HR 3395. (Pet. Supp. App. 16-17).

Thus, the trial court's recollection of the expert's testimony is correct, as is Elliott's statement of the facts on the subject.

5. Conflicting Testimony Regarding When The Blood Drop On The Outside Back Gate Was Found By Officer Leo.

The Respondent notes that Officer Leo testified at trial that he collected the blood drop on the day of the crimes. But Elliott's statement of facts focuses on the new evidence, developed by Elliott's investigator, that Leo testified falsely because Leo's supervisor, Sergeant Zinn, told the investigator that the blood spot was *not* collected on the day of the crimes but "they went back within not more than 2 days or maybe the next day to collect the blood from the back gate." (Resp. App. 3).

Again, the Respondent is, at best, making the case for why there were genuine disputes of material fact that precluded a motion to dismiss under Civil Rule 12(b)(6) or a summary judgment motion and mandated an evidentiary hearing.

CONCLUSION

The Respondent failed to respond to Elliott's arguments that the issues he raises in his Petition are clearly "debatable" and hence necessitate a Certificate of Appealability. Instead, the BIO tries to argue the merits of the case and, even then, does not provide the Court with accurate statements as to the actual testimony and evidence at trial.

The Petitioner respectfully requests that certiorari or a certificate of appealability be granted.

Respectfully submitted,

THOMAS E. KELLY, JR.
JOANNE M. HEPBURN
K&L GATES LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104
Telephone: (206) 370-6683
Facsimile: (206) 623-7022

STANFORD PURSER
K&L GATES LLP
1717 Main St., Suite 2800
Dallas, TX 75201
Telephone: (214) 939-5500
Facsimile: (214) 939-6100

ROBERT LEE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
2421 Ivy Rd., Suite 301
Charlottesville, VA 22903
Telephone: (434) 817-2970
Facsimile: (434) 817-2972

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson St.
Tallahassee, FL 32301
Telephone: (850) 224-0004
Facsimile: (850) 224-3331

Excerpts of Testimony of Rebecca Gragg

March 31, 2003

He said that he was by this restaurant that he had taken me to at one point where he was trying to dump these trash bags. And I said what trash bags and he said these bloodied black trash bags from the mess that Jerry had made.

Q Did you know which restaurant he was talking about?

A Yes, I did.

Q When you told the police about this, did you tell them what restaurant it was? Did you describe for them where it was?

A Yes. I described it to them. I couldn't remember the exact name at the time I told the police.

Q And when did you tell the police all these things?

A I told the police the rest of everything I knew the day that he got arrested.

Q When was that?

A May 10th.

Q And what was different about that day?

A What was different about that day was that he was in custody and he couldn't hurt me at that point for telling them the truth.

Q Why didn't you tell the truth to the police from the very beginning?

A Mr. Elliott had been following me, driving by my house still after the murders. I wouldn't talk to him. And then I still wasn't sure about this Jerry guy. He was out. I mean, I had no guarantee that he wasn't going to hurt me.

The police hadn't arrested him yet. I was scared to tell them. I was more afraid of what he could do –

Q Did you tell your attorney you were scared?

A Well, my attorney knew that I was afraid of Mr. Elliott, yes.

Q Now, of all the conversations that you've ever had with Mr. Elliott, did he ever admit to you that he committed these crimes?

A No, he didn't.

* * *

HR 1586-87

Police Interview of Elliott
January 3, 2001

Hoffman: "We're gonna track your cell phone calls, every cell phone call you made. You know we're gonna do that if we haven't done it already, okay? You know that. You know that exists. You know we can do it and we're gonna do it and put you in certain places making certain calls because we can track which cell tower your radio signal goes to, okay? Those are like repeaters or whatever else. You probably know this stuff better than I do."

Elliott: "Yes."

* * *

HR 5714-15

Police Interview of Rebecca Gragg
January 4, 2001

Masterson: "Do you know that we could tell you exactly from where a cell phone call was made?"

Gragg: "I figured."

Hoffman: "Do you know how it works?"

Gragg: "No."

Hoffman: "Its . . . your sending . . . your cell phone sent out a radio signal and it goes to the nearest repeaters or whatever you want to call them they have those little things up on the roof some of things and whatever."

Gragg: "Okay."

Hoffman: "Towers and up those . . . those things take those signal and put it on the hard wire line."

Gragg: "Um huh."

Hoffman: "Okay where they hit those signals is recorded. So any kind of call you make is going . . . you know you're in Florida, it's going to tell us you're in Florida."

Gragg: "Um huh."

Hoffman: "You know you're up here in Prince William County it's going to tell us which one of these antennas you know."

Gragg: "Um huh."

Hoffman: "So you're going to be able to take, you know, a circle around the antenna and say you're in that circumference."

Gragg: Um huh."

Hoffman: "Right do you understand that?"

Gragg: "Yes."

Hoffman: "Um that's . . . that's going to happen. That's in the works. They don't just tell you that you know. You don't call up and they give you the answer. That . . . you know they got to play with the computers do whatever they do, but it takes a little bit of time. Okay but all that is going to be . . . "

* * *

HR 2197-98

[LOGO]
Charlie T. Deane **POLICE**
Chief of Police **DEPARTMENT**

COUNTY OF PRINCE WILLIAM
15948 Donald Curtis Drive, Woodbridge, VA 22191
(703) 792-7200 Metro 631-1703

June 12, 2002

Henry W. Asbill
Asbill, Junkin, & Boss, Attorneys At Law
1615 New Hampshire Avenue, N.W.
Washington, D.C. 20009-2520

Dear Mr. Asbill,

Per Mr. Willett's instruction please find enclosed telephone records which we received.

I used these records in order to generate a chart showing certain incoming and outgoing calls from the phone number 443-562-5663. Not all the phone numbers which are in the records were placed into the chart. I only entered certain telephone numbers. In addition this chart is a compilation of two separate printouts. I have enclosed both. The short printout deals with just the incoming calls to the above telephone number.

In reviewing the chart that I generated for the Office of the Commonwealth's Attorney I find that I have a typographical error in the upper left corner of the chart. The last digit of the telephone number was wrong. I have struck through the error, made the correction, and initialed that correction.

If you have any questions, please give Mr. Willett a call.

Sincerely,

/s/ L.P. Kowalski
L.P. Kowalski, Master Detective
Criminal Investigation Division

Generated By : Larryson

CALLS TO DESTINATION NUMBER

From: 12/30/2000 12:00 AM To: 01/05/2001 11:59 PM
Number Called: 4435625663
Subscriber Type : ALL
Authentication Type: ALL

	MobileId	Call Date	Call Time HH:MM:SC	Call Duration HH:MM:SC	Cell Site
1	703-338-4819	01/05/2001	01:11:08 AM	00:01:19	[redacted]
2	703-338-4819	01/05/2001	12:28:58 AM	00:02:35	
3	443-562-5663	01/04/2001	09:07:43 PM	00:00:28	
4	443-562-5663	01/04/2001	01:44:49 PM	00:00:33	
5	443-562-5663	01/04/2001	11:36:38 AM	00:00:34	
6	443-562-5663	01/04/2001	11:03:21 AM	00:00:39	
7	443-562-5663	01/04/2001	05:48:12 AM	00:00:42	
8	443-562-5663	01/03/2001	03:17:52 PM	00:00:39	
9	703-338-4819	01/03/2001	09:47:08 AM	00:13:19	
10	703-338-4819	01/02/2001	11:50:31 AM	00:03:15	
11	703-338-4819	01/02/2001	08:42:13 AM	00:06:10	
12	703-338-4819	01/02/2001	07:23:39 AM	00:02:22	
13	703-338-4819	01/02/2001	01:35:24 AM	00:01:13	
14	703-338-4819	01/02/2001	01:31:21 AM	00:03:08	
15	443-562-5663	01/01/2001	11:23:37 PM	00:00:19	
16	703-338-4819	01/01/2001	10:45:57 PM	00:01:30	
17	443-562-5663	01/01/2001	07:57:20 PM	00:00:37	
18	703-338-4819	01/01/2001	07:15:49 PM	00:00:07	
19	703-338-4819	01/01/2001	07:07:32 PM	00:06:08	
20	443-562-5663	01/01/2001	05:07:36 PM	00:00:40	
21	703-338-4819	01/01/2001	05:26:39 AM	00:17:33	
22	703-338-4819	01/01/2001	03:18:05 AM	00:00:44	
23	703-338-4819	12/31/2000	02:03:18 PM	00:00:21	
24	443-562-5663	12/31/2000	02:02:13 PM	00:00:30	
25	703-338-4819	12/31/2000	09:58:05 AM	00:31:03	
26	703-338-4819	12/31/2000	09:09:06 AM	00:05:19	
27	703-338-4819	12/30/2000	11:51:47 PM	00:06:38	
28	703-338-4819	12/30/2000	10:00:23 PM	00:00:33	
29	443-562-5663	12/30/2000	09:59:14 PM	00:00:43	
30	443-562-5663	12/30/2000	07:55:30 PM	00:01:03	
31	703-338-4819	12/29/2000	06:25:26 PM	00:04:22	
32	443-562-5663	12/29/2000	05:47:42 PM	00:00:38	
33	703-338-4819	12/29/2000	05:39:46 PM	00:00:29	
34	703-338-4819	12/29/2000	05:39:19 PM	00:00:07	
35	703-338-4819	12/29/2000	04:36:05 PM	00:00:04	
36	703-338-4819	12/29/2000	02:52:07 PM	00:18:11	
37	443-562-5663	12/29/2000	11:21:46 AM	00:05:53	
38	703-338-4819	12/28/2000	11:41:51 PM	00:03:37	
39	443-562-5663	12/28/2000	08:40:51 PM	00:00:29	
40	443-562-5663	12/28/2000	07:58:23 PM	00:04:38	
41	703-338-4819	12/28/2000	07:24:51 PM	00:00:25	
42	703-338-4819	12/28/2000	07:18:06 PM	00:00:02	
43	703-338-4819	12/28/2000	06:04:31 PM	00:00:40	
44	703-338-4819	12/28/2000	06:04:06 PM	00:00:01	
45	703-338-4819	12/28/2000	01:01:29 PM	00:02:03	
46	443-562-5663	12/28/2000	11:14:10 AM	00:00:11	
47	703-338-4819	12/28/2000	01:21:43 AM	00:07:01	
48	703-338-4819	12/27/2000	10:22:11 PM	00:00:21	
49	703-338-4819	12/27/2000	10:21:16 PM	00:00:20	
50	703-338-4819	12/27/2000	09:49:27 PM	00:03:23	
51	443-562-5663	12/27/2000	07:01:29 PM	00:01:19	

8-V

52	443-562-5663	12/27/2000	04:00:56 PM	00:04:27
53	703-338-4819	12/27/2000	03:31:52 PM	00:07:23
54	443-562-5663	12/26/2000	08:41:00 AM	00:00:12
55	443-562-5663	12/25/2000	06:10:00 PM	00:00:44
56	703-338-4819	12/25/2000	05:35:26 PM	00:00:39
57	443-562-5663	12/25/2000	09:56:46 AM	00:00:42
58	703-338-4819	12/25/2000	01:43:21 AM	00:00:26
59	443-562-5663	12/24/2000	10:30:59 PM	00:00:37
60	703-338-4819	12/24/2000	10:22:58 PM	00:00:33
61	443-562-5663	12/24/2000	04:21:11 PM	00:01:07
62	443-562-5663	12/23/2000	09:45:32 PM	00:01:23
63	443-562-5663	12/23/2000	09:16:37 AM	00:00:16
64	703-338-4819	12/22/2000	10:09:59 PM	00:03:40
65	703-338-4819	12/22/2000	03:01:47 PM	00:00:16
66	703-338-4819	12/22/2000	02:17:15 PM	00:01:14
67	703-338-4819	12/22/2000	02:16:21 PM	00:00:08
68	703-338-4819	12/22/2000	01:50:35 PM	00:00:52
69	703-338-4819	12/22/2000	01:50:12 PM	00:00:02
70	703-338-4819	12/22/2000	11:49:35 AM	00:04:23
71	703-338-4819	12/21/2000	10:00:21 PM	00:03:53
72	703-338-4819	12/21/2000	09:50:40 PM	00:00:36
73	703-338-4819	12/21/2000	12:33:30 PM	00:01:37
74	443-562-5663	12/21/2000	10:47:07 AM	00:00:33
75	443-562-5663	12/20/2000	10:09:08 PM	00:00:46
76	703-338-4819	12/20/2000	10:06:05 PM	00:02:57
77	703-338-4819	12/20/2000	09:55:55 PM	00:00:29
78	703-338-4819	12/20/2000	06:17:42 PM	00:02:07
79	703-338-4819	12/20/2000	12:13:52 AM	00:00:39

[redacted]

TOTAL USAGE: 03:29:28

Attachment D

5629

JD 0008519

Trial Judge's Statement RE DNA Evidence
April 2, 2003

THE COURT: We are back on the record in the case of the Commonwealth versus Elliott. Let the record reflect that the Defendant and all counsel are present.

The – my initial inclination with respect to instruction A-1, and it might be wrong, could be; the evidence in the record, it seems to me, that might warrant giving this instruction is the evidence, the blood evidence from the crime scene, which stands for the proposition, as I recall the testimony, that at least one or perhaps two blood stains from the crime scene were found, the blood sample which was composed of the blood of one of the victims and a third party, not the Defendant. That is what the sum and substance of the evidence I believe or the testimony was.

He was asked whether that could – he might have been asked whether it was a combination of the blood of the two victims and he couldn't say. Certainly the blood of one victim, certainly the blood of a third party, not the Defendant. He did say it was not the Defendant's.

MR. EBERT: There was blood on the pants.

MR. MOFFITT: The pants and the back board.

THE COURT: And one other that yielded that conclusion. I think in the face of that sort of evidence and the face of the evidence that the

Defendant relies arguably in or near the crime scene I think that this instruction then is probably warranted.

* * *

MR. MOFFITT: My claim to mere presence is simply that I believe that there is a long line of Virginia cases that says that mere presence is not enough and that the Commonwealth would have to show something beyond mere presence to convict Mr. Elliott.

THE COURT: If the evidence is concededly that the Defendant was there at the scene of the crime but not share the criminal intent of someone who acted in a more direct fashion to perpetrate the crime, that is typically the context within which this instruction is given. And it is given to instruct – to guide a jury's thinking with respect to what it means that he was there but did nothing more.

You are not conceding that he was there at all. But, I think that the Jury could infer from this evidence, without regard to concession or no concession you, that he was in fact there. I think that the Jury could infer from the evidence that someone else was there inside and that is because of the blood evidence, testimony that was put into evidence. So, the Jury could infer that. They could infer that your

client was in or about the scene and that someone else was inside.

* * *

HR 1854-58

Commonwealth of Virginia
Department of Criminal Justice Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

RESULTS:

Item 3

Test results indicate the presence of blood on the stained swab from the "back door". No evidence of blood was detected on the control swab. Human deoxyribonucleic acid (DNA) was isolated from the stained swab. This sample was amplified and typed using the PowerPlex 1.1 system (which includes the CSFIPO, TPOX, TH01, vWA, D16S539, D7S820, D13S317 and D5S818 loci). No amplification results were obtained at the CSFIPO, TPOX, D16S539, D7S820, D13S317 and D5S818 loci. Based on the DNA typing results obtained at the TH01 and vWA loci, the DNA profile obtained from the stained swab is consistent with a mixture. Dana L. Thrall cannot be eliminated as a possible co-contributor to the genetic material obtained from this sample. No conclusions can be made in reference to Robert A. Finch being a possible co-contributor to the genetic material obtained from the stained swab. Larry B. Elliot is eliminated as a possible co-contributor to the genetic material obtained from this sample.

HR 2589

Commonwealth of Virginia
Department of Criminal Justice Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

April 30, 2002

Your Case #: 01-546

Victim(s): THRALL, Dana L.
FINCH, Robert A.

Suspect(s): ELLIOT, Larry Bill

Evidence Submitted By: T. K. Leo

Received: 01/16/02

Item 18 Blue jeans from Robert A. Finch

RESULTS:

Item 18

Test results indicate the presence of blood in thirteen stained areas designated A through L and N. In addition, test results for the presence of blood were inconclusive for two stained areas designated M and O. Human deoxyribonucleic acid (DNA) was isolated from the stained areas A through N from the blue jeans. These samples were amplified and typed using the PowerPlex 1.1 system (which includes the CSFIPO, TPOX, TH01, vWA, D16S539, D7S820, D13S317 and D5S818 loci). No human DNA isolation or amplification results were obtained from stained area O using the PowerPlex 1.1 system.

DNA profiles consistent with either a single source contributor or a mixture of at least two

contributors were obtained from stained areas A through L and N. Larry B. Elliot is eliminated as a possible contributor or co-contributor to each of these stained areas. In addition, no types foreign to the DNA profiles of Dana L. Thrall or Robert A. Finch were detected in these stained areas.

A mixture DNA profile consistent with Robert A. Finch and at least one other individual was obtained from stained area M. Larry B. Elliot is eliminated as a possible co-contributor to the foreign genetic material obtained from this sample. No conclusions can be made in reference to Dana L. Thrall being a possible co-contributor to this mixture. The DNA profile foreign to Robert A. Finch detected at the TH01, vWA, D7S820, D13S317 and D5S818 loci was not suitable for searching against the Virginia DNA Data Bank.

HR 2595

Excerpts of Testimony of Bryan P. Edmonds

April 1, 2003

Q What about the mixture on Robert Finch's jeans?

A That particular mixture, in that particular mixture from Robert Finch's jeans, the DNA profile was consistent with a mixture, and Mr. Finch could not be excluded as a co-contributor to that mixture.

I could not draw any conclusions to Ms. Thrall as been a co-contributor and Mr. Elliott was eliminated.

Q So whose DNA is it?

A I don't know unless I have a comparison sample to compare it to.

Q You know it's not Elliott's? Correct.

Q It could be someone other than Finch and Thrall?

A There is an additional individual that's in that mixture. I couldn't draw any conclusions to Dana Thrall because some of the foreign DNA that was detected was consistent with her, but there were some additional foreign DNA which was not consistent with her.

So there wasn't enough information to include your and exclude her from that particular mixture. So no conclusion could be drawn to her, however I can't tell you who with that particular foreign DNA is from.

Q You say you cannot?

A Cannot.

* * *

HR 3995-96

Q Anything from the interior of the home that you examined that was consistent with Bill Elliott's blood?

A No, there was not.

Q Item No. 3, and that's on your Exhibit No. 64, do you have that there?

A Yes.

Q That was from the back door; am I right?

A That's correct.

Q You developed genetic material or DNA; am I right?

A Yeah, DNA results were obtained from that HR 1824-25 particular sample.

Q And Dana Thrall could not be eliminated; am I right?

A That's correct.

Q But you couldn't draw any conclusions as to whether or not in that mixture Mr. Finch's blood or Mr. Finch's DNA was there?

A Correct. This is a sample where I obtain a partial profile at two out of the eight areas that are analyzed. Based on those two areas Dana Thrall could not be eliminated. There was one area where Mr. Finch could be included because he was not included in the other area, I simply could not eliminate or include him.

Q So that could be Mr. Finch's DNA or somebody else's, correct?

A It could be actually from another individual.

Q Now, one thing you could conclude about that was that Bill Elliott's DNA was not part of that; am I right?

A That's correct.

* * *